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No. 08-605

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IN THE

United States Supreme Court

ROBINSON WLADIMIR GONZÁLEZ-MESÍAS,
Petitioner,

v.

ERIC H. HOLDER, JR.,
United States Attorney General,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Respondent acknowledges the existence of an inter-circuit conflict concerning an issue this Court has previously recognized to be of great importance to many lawful permanent residents ("LPRs"): the availability of a discretionary waiver of deportation under former § 212(c) of the Immigration and Nationality Act ("INA"), 8 U.S.C. 1182(c) (1994) (repealed 1996). The circuit conflict urgently calls for this Court's intervention. Absent that intervention, the availability of a waiver will continue to turn on the circuit in which deportation proceedings are held.

While conceding that the circuits are split over the constitutionality of the "statutory counterpart" test for determining waiver eligibility in deportation cases, Respondent suggests that this constitutional issue is not of substantial importance and the petition is premature. Respondent additionally argues, on the merits, that the courts upholding the statutory counterpart test are correct. These arguments do not assist Respondent here. First, this Court's ruling in *INS v. St. Cyr*, 533 U.S. 289 (2001), and the facts set forth in the Petition (facts that Respondent does not dispute) amply establish the substantial importance of the question presented. Second, notwithstanding Respondent's contentions to the contrary, the en banc Ninth Circuit's recent decision in *Abebe v. Mukasey*, 554 F.3d 1203 (9th Cir. 2009) (en banc), in no way suggests that the Petition is premature. To the contrary, that decision further entrenches the inter-circuit conflict and demonstrates its intractability. Third, in attempting

to defend the statutory counterpart test, Respondent offers no rational basis for treating Petitioner more harshly than other LPRs merely because he never left the country. The position taken by the Second Circuit, which has held that such differential treatment violates equal protection, is well reasoned and persuasive, and should be established as the law of the land by decision of this Court.

I. RESPONDENT CONCEDES THAT THE CIRCUITS ARE SPLIT OVER WHETHER THE STATUTORY COUNTERPART TEST FOR § 212(C) RELIEF VIOLATES EQUAL PROTECTION.

Respondent acknowledges that there is a split among the circuits in regard to the constitutionality of the statutory counterpart test for § 212(c) relief. Specifically, Respondent acknowledges that the Second Circuit has disagreed with the Ninth Circuit and others that have upheld the statutory counterpart test. Opp. 4.

Respondents do not suggest that the Second Circuit has any inclination to reverse its position in *Blake v. Carbone*, 489 F.3d 88 (2d Cir. 2007), or that any other circuit is inclined to reverse itself and adopt the Second Circuit's view. The circuits have entrenched themselves into their diametrically opposed positions. The Second Circuit expressly recognized that it was disagreeing with "several other circuits" when it held in *Blake* that the statutory counterpart tests violates the constitutional guarantee of equal protection. *See* 489 F.3d at 103-04. (2d Cir. 2007). In no uncertain terms, the *Blake* court rejected the "formulaic"

approach of the other circuits, noting that it was "bound . . . to ensure that 'permanent residents who are in like circumstances, but for irrelevant and fortuitous factors, be treated in a like manner.'" *Id.* at 104 (quoting *Francis v. INS*, 532 F.2d 268, 273 (2d Cir. 1976)). Other circuits have likewise recognized their split with the Second Circuit since its decision in *Blake*, but have declined to follow that decision. *See Koussan v. Holder*, No. 07-4107, 2009 WL 330999, at *5 (6th Cir. Feb. 12, 2009); *Zamora-Mallari v. Mukasey*, 514 F.3d 679, 691-92 (7th Cir. 2008); *Vue v. Gonzalez*, 496 F.3d 858, 861 (8th Cir. 2007).

Thus, Petitioner asks this Court to resolve a widely recognized, settled, split of authority whose existence Respondent does not, and cannot, dispute.

II. THE NINTH CIRCUIT'S RECENT EN BANC DECISION IN *ABEBE* FURTHER ENTRENCHES THE CIRCUIT SPLIT.

As described in Respondent's Opposition (Opp. 8), since the filing of the petition for a writ of certiorari in this case, the Ninth Circuit has vacated its prior decision in *Abebe v. Mukasey*, 493 F.3d 1092 (2007) (which, as discussed at Pet. 19-21, declined to follow the Second Circuit in *Blake* and found the statutory counterpart test to be constitutional), reheard the case en banc, and issued a new decision. *See Abebe*, 554 F.3d 1203. The en banc court in *Abebe* held that there is no equal protection requirement to extend eligibility for § 212(c) relief to deportable aliens when Congress has only made such relief available to aliens facing exclusion (or "inadmissibility"). *Id.* at 1205-07. As a consequence of that holding, the

court further held that the BIA committed no equal protection violation by denying § 212(c) relief to the petitioner in that case. *Id.* at 1207. A petition for rehearing in *Abebe* is pending.

The en banc Ninth Circuit decision in *Abebe* parts company, in regard to its reasoning, with the decisions of the other circuits that have affirmed the constitutionality of the statutory counterpart test. In particular, while the decision accords with the Third, Fifth, Sixth, Seventh and Eighth Circuits' conclusions that the statutory counterpart test satisfies equal protection, it rejects the very premise for the existence of the statutory counterpart test—*i.e.*, that equal protection *requires* it. *Compare Abebe, supra*, with *Valere v. Gonzales*, 473 F.3d 757 (7th Cir. 2007); *Caroleo v. Gonzales*, 476 F.3d 158 (3d Cir. 2007); *Voe v. Gonzales*, 482 F.3d 363 (5th Cir. 2007); *Dalombo Fontes v. Gonzales*, 483 F.3d 115 (1st Cir. 2007); *Soriano v. Gonzales*, 496 F.3d 909 (8th Cir. 2006); *Koussan*, 2009 WL 330999, at *5.

Respondent argues that the "additional rationale" introduced by the *Abebe* decision refutes Petitioner's claim that the question presented in this case has "fully percolated." Opp. 9. Respondent thus suggests that the question presented is premature. Not so. That the Ninth Circuit's decision in *Abebe* goes farther than other courts in rejecting a challenge to the statutory counterpart test—by denying that the test is ever constitutionally necessary—merely entrenches further the split at issue between the Second Circuit and its sister circuits.

As between the Second Circuit and Ninth Circuit, in particular, the split now appears even more intractable and unlikely ever to be resolved without this Court's intervention. The deep split between those circuits alone is of great significance, given that, as indicated by data set forth in the Petition, the Second and Ninth Circuits together receive a large majority (approximately 71%) of all petitions for review of BIA decisions. Pet. 30-31.

While the *Abebe* decision does create an additional split between the Ninth Circuit and those circuits that accept the underlying premise for the statutory counterpart test, that split is ancillary to the question presented in this case.

III. RESPONDENT'S EFFORT TO MINIMIZE THE IMPORTANCE OF THE QUESTION PRESENTED IS UNAVAILING.

In contesting Petitioner's argument concerning the importance of the question presented, Respondent takes issue with Petitioner's use of data on the large number of deportations for criminal offenses, and for aggravated felonies in particular. Opp. 10. Specifically, Respondent argues that the affected class is a "great deal smaller" than Petitioner's data suggest, because the Petition relates to a statute repealed 12 years ago and applicable today only to a limited class of LPRs who meet several criteria, including the following: (1) aggravated felony convictions; (2) convictions predating the repeal of § 212(c); (3) pleas of guilty or no contest; and (4) a deportation charge that has no "comparable" statutory ground of inadmissibility. Opp. 10. This is a hollow argument. Respondent

points to no actual data indicating that the class affected by the issue raised in the Petition is small. Furthermore, and more importantly, Respondent fails to come to grips with this Court's opinion in *St. Cyr* (discussed at Pet. 26-28), which recognizes the critical importance of § 212(c) relief, even after the repeal of that statute, to a large class of individuals with convictions for aggravated felonies, following guilty pleas, or plea bargains or their equivalent.

In *St. Cyr*, this Court recognized that the "extension of § 212(c) relief to the deportation context has had great practical importance" to an "extremely large" class. 533 U.S. at 295-96 (2001). The Court noted specifically that the 1996 expansion of the definition of "aggravated felony" rendered the number of individuals dependent on eligibility for § 212(c) relief even higher than the numbers suggested by relevant data the Court had found. *Id.* at 296 n.6. Against this backdrop, the Court held that the repeal of § 212(c) does not apply retroactively to aliens who entered guilty pleas prior to its repeal. *Id.* at 323-26.

Respondent's suggestion that the class affected by the issue raised in the Petition is insubstantial, and that the availability of § 212(c) relief to members of that class is not a matter of much importance, directly contradicts this Court's contrary conclusion in *St. Cyr*. Respondent is correct that the *St. Cyr* Court had no occasion to address the "statutory counterpart" test. The Court nonetheless did recognize that the availability of § 212(c) relief—including specifically its availability in cases involving aggravated felonies—is an issue of substantial importance. That important issue is

squarely presented by the Petition, because LPRs convicted of aggravated felonies will most often fail the statutory counterpart test (*see* Pet. 27-28), guaranteeing that the availability of § 212(c) relief for such individuals will be severely curtailed.

In an additional effort to minimize the importance of the issue presented by the Petition, Respondent asserts that the circuit split is "heavily lopsided." Opp. 9. Respondent neither disputes nor even addresses, however, the data presented in the Petition indicating that the Second Circuit receives a highly disproportionate number of appeals from BIA decisions—nearly 25% of the total. *See* Pet. at 30-31, & n.8. A hypothetical case in which a circuit that receives virtually no immigration cases disagrees with all of the other circuits on an issue of immigration law might present a split of little importance. That is not the case here. Here, a large percentage of LPRs find themselves eligible for § 212(c) relief on equal protection grounds, because they are in the Second Circuit, while numerous other LPRs in jurisdictions outside of the Second Circuit are subject to a different interpretation of equal protection requirements and are therefore denied relief. Respondent's myopic focus on the mere count of circuits on each side of the question presented obscures these salient circumstances warranting the Court's intervention.

IV. RESPONDENT FAILS TO IDENTIFY ANY RATIONAL BASIS FOR TREATING PETITIONER MORE HARSHLY THAN SIMILARLY SITUATED ALIENS MERELY BECAUSE HE NEVER LEFT THE COUNTRY.

Respondent attempts to skirt the pertinent question of whether it violates equal protection to treat a deportable LPR more harshly than an inadmissible LPR merely because the deportable LPR never left the country. Accordingly, Respondent does not attempt to identify any rational basis for this differential treatment. As articulated by Respondent, the question presented is simply whether denial of § 212(c) relief violates the constitutional guarantee of equal protection "where an alien who is removable because he committed specific aggravated felonies is not being treated differently from other aliens who are similarly removable on grounds that have no statutory counterpart in the INA's grounds for inadmissibility." Opp. I.

Notwithstanding Respondent's attempt to avoid the critical question, Respondent implicitly recognizes the linchpin issue presented by the Petition in proposing that "petitioner could easily have avoided [the statutory counterpart test's] effects by departing the country voluntarily at any point before his removal proceedings were initiated in 2005." Opp. 10. Respondent thus recognizes that petitioner's failure to have ever left the country—even had he just stepped across the border once and immediately returned—is all that stands between him and eligibility for a § 212(c) waiver.

In addressing the statutory counterpart test, the Second Circuit, in *Blake*, correctly discerned the issue before it as "whether the 'irrelevant and fortuitous' circumstance of not leaving the country stands in the way of petitioner's eligibility for a § 212(c) waiver." *Blake* 489 F.3d at 101 (citing *Francis*, 532 F.2d at 273). Having correctly discerned the issue, the court found, in a persuasive and well reasoned opinion, that the statutory counterpart test violates equal protection. *Id.* at 101-04. The *Blake* court explained that what makes one removable alien similarly situated to another is that he or she has committed an identical offense to that committed by another alien—not whether Congress used the same language to capture the offense for both excludable and deportable aliens. *See id.*

Focusing on whether the same language is used to capture identical offenses (as the statutory counterpart test does) results in treating certain LPRs more harshly than others merely because they have never left this country—a constitutionally repugnant result. Compounding this constitutional affront, the statutory counterpart test gives the government unfettered discretion to ensure, whenever desired, that an LPR cannot seek a § 212(c) waiver. The government need only select deportation grounds that do not have a precise statutory counterpart in the grounds for inadmissibility. Pet. 28-29. Respondent entirely ignores this compounding problem, just as Respondent ignores the principal problem of penalizing an LPR for settling, with constancy, in this country. Determining whether LPRs are

similarly situated on the basis of whether they have committed the same criminal offenses avoids these problems, and is the approach to equal protection that Petitioner would urge this Court to adopt if the Petition is granted. That approach would rightly ensure that individuals like Petitioner, who lived productively in this country with his U.S. citizen spouse for nearly 20 years after his *Alfred* plea, without any further criminal incident, will have the same opportunity to seek a deportation waiver as others similarly situated.

CONCLUSION

For the foregoing reasons, this Court should grant a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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